STATE OF MICHIGAN

COURT OF APPEALS

GARY M. WOJNAR,

Plaintiff-Counterdefendant-Appellant,

v

LINDA S. WOJNAR,

Defendant-Counterplaintiff-Appellee.

UNPUBLISHED
February 28, 2006

No. 257322
Wayne Circuit Court
LC No. 01-114031-DM

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of divorce, which incorporated an arbitration award pursuant to which plaintiff was required to pay spousal support to defendant. Plaintiff argues that the trial court erred in failing to vacate the arbitrator's ruling. We disagree and affirm.

In April 2001, plaintiff filed a complaint for divorce. Defendant filed a countercomplaint. Thereafter, the parties agreed to submit the case to binding arbitration. In August 2002, the parties entered into a "Matrimonial Arbitration Agreement" with the arbitrator, which delineated the terms of the arbitration process. Arbitration began in October 2002, and the arbitrator issued the award on February 16, 2004. Subsequently, plaintiff filed a motion to vacate the arbitration award; however, the trial court denied the motion.

Generally, we review de novo a trial court's decision to enforce, vacate, or modify a statutory arbitration award. *Bayati v Bayati*, 264 Mich App 595, 597-598; 691 NW2d 812 (2004). However, claims of factual error by the arbitrator are beyond the scope of appellate review. *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999). As of March 28, 2001, any domestic relations arbitration became subject to Michigan's Domestic Relations Arbitration Act (DRAA), MCL 600.5070 *et seq.* See *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003), aff'd on other grounds 470 Mich 186 (2004). Pursuant to the DRAA, parties in a divorce action may consent to binding arbitration through a signed agreement providing for an award on disputed matters, including property division, child custody, child support, parenting time, and spousal support. MCL 600.5071; *Harvey*, *supra* at 284. Generally, a trial court must enforce a statutory arbitration award or ruling. MCL 600.5079(1). A trial court must, however, vacate an arbitration award where it was procured by corruption, fraud, or other undue means,

where there was evident partiality by the arbitrator or misconduct prejudicing a party's rights, where the arbitrator exceeded his or her powers, or where there were procedural errors, such as when the arbitrator refuses to hear material evidence or otherwise conducts the hearing in a manner that substantially prejudices a party's rights. MCL 600.5081(2); *Harvey, supra* at 288.

On appeal, plaintiff first claims that the arbitration award should have been vacated under MCL 600.5081(2)(b) because the arbitrator was biased and committed misconduct that prejudiced plaintiff's rights. Plaintiff never presented this argument to the trial court in support of his effort to have the arbitration award vacated, nor was the argument ever made to the arbitrator; therefore, the issue has not been preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Regardless, the record does not support the claim that the arbitrator was biased or committed misconduct. An unfavorable ruling alone does not support the existence of bias. *Cain v Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996). Regarding the alleged ex parte communications between the arbitrator and defense counsel, plaintiff fails to cite any such communications. Arguably, plaintiff's own letter to the arbitrator requesting that the arbitrator contact his witness but not reveal her identity constitutes an ex parte communication with the arbitrator. Regarding the supplemental documents, the arbitrator permitted *both* parties the opportunity to submit additional evidence and arguments to support their positions, and both parties exercised the opportunity.

Plaintiff also claims that the arbitrator was biased against him because he was required to pay spousal support after having presented evidence that defendant had more income than he. This argument is essentially one claiming bias because of an unfavorable ruling, which in itself does not suffice. *Cain, supra* at 495-496. Additionally, it appears to be an argument made in an effort to skirt the rule that claims of factual error by the arbitrator are beyond the scope of our review. *Konal, supra* at 75. By presenting the argument in the context of a bias claim, plaintiff apparently seeks to avoid the impact of the rule. Nonetheless, there is no support in the record for plaintiff's argument.

The objective of spousal support is to balance the incomes and needs of the parties so that neither party is impoverished. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Spousal support should be based on a just and reasonable amount given the following circumstances: (1) the parties' past relations and conduct, (2) the length of the marriage, (3) the parties' abilities to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the parties' abilities to pay spousal support, (7) the parties' present situations, (8) the parties' needs, (9) the parties' health, (10) the parties' prior standard of living and whether the parties are responsible for supporting others, (11) the parties' contributions to the joint estate, (12) the parties' fault, and (13) general principles of equity. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996); *Thames v Thames*, 191 Mich App 299, 307-308; 477 NW2d 496 (1991).

In the instant case, the arbitrator considered 12 of the 13 delineated factors as relevant in deciding spousal support. Further, the arbitrator's findings were supported by the evidence that the parties were married for 12 years, plaintiff was a licensed attorney capable of earning significant income and reestablishing his standard of living, defendant was suffering from progressive Multiple Sclerosis (MS) and would likely be unable to find and maintain employment, and defendant was in need of medical coverage that plaintiff allowed to lapse. The arbitrator specifically addressed the insurance proceeds relative to defendant's income and found

that the money was not attributable as income to defendant because it was designated for the care of her disabled son from a prior marriage and would be needed to pay other professionals to provide the care that defendant had provided before her health deteriorated. There was evidence that defendant's son was permanently disabled and required constant care and that both plaintiff and defendant had previously provided a great deal of the caregiving. There was also evidence that defendant would eventually be unable to provide care for her son because of her MS. Thus, the arbitrator's finding that the insurance money would be needed to pay others to provide the care for her son that defendant previously provided was not contrary to the evidence. Given that the arbitrator addressed the factors and that there was evidence to support the findings, there is simply no direct indication of arbitrator misconduct or bias.

With respect to MCR 3.602(J)(1)(b), a provision parallel to MCL 600.5081(2)(b), this Court has stated that the "[p]artiality or bias which will allow a court to overturn an arbitration award must be certain and direct, not remote, uncertain or speculative." *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988).[1] Review of the record reveals no indication, direct or otherwise, of partiality, and plaintiff's assertions in that regard are purely speculative. Reversal is unwarranted.

Plaintiff next argues that the arbitrator exceeded his authority by refusing to allow examination of a subpoenaed witness. In a closely related argument, plaintiff argues that the arbitrator refused to hear material evidence and otherwise conducted the hearing in an improper manner that prejudiced plaintiff.

With respect to the manner in which the hearing was conducted, although plaintiff admits that a hearing was held on October 23, 2002, plaintiff asserts that the hearing "consisted of putting the parties in 2 separate rooms with the arbitrator talking to the [p]laintiff and his counsel for some twenty (20) minutes." Defendant asserts otherwise, claiming that the arbitrator held a "formal hearing with both parties present, and allowed both parties to submit any supporting evidence." Plaintiff again failed to raise this argument below and that the trial court's opinion does not address this issue.

Plaintiff cites *Miller v Miller*, 264 Mich App 497, 500; 691 NW2d 788 (2004), in which the arbitrator conducted an "arbitration" during which he "separated the parties into two rooms and attempted to resolve certain contentious issues between the parties[,]" and this Court reversed the trial court's refusal to set aside the arbitration award because the arbitrator did not conduct a hearing as contemplated by the DRAA. However, our Supreme Court subsequently reversed this Court's ruling in *Miller*, concluding:

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[1] MCL 600.5081(2)(b) provides that the court must vacate an award where there "was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights." Similarly, MCR 3.602(J)(1)(b) provides that the court must vacate an award if "there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights[.]" See *Bayati*, *supra* at 601 n 1.

> We hold that the [DRAA] does not require that the formality of a hearing in arbitration proceedings approximate that of a hearing in court. Arbitration is by its nature informal. The appropriate structure for an arbitration hearing is best decided by the parties and the arbitrator. A procedure by which the arbitrator shuttles between the parties in separate rooms questioning and listening to them satisfies the act's requirement of a hearing. [*Miller v Miller*, 474 Mich 27, __ NW2d __ (2005).]

Here, the record indicates that the arbitrator conducted a hearing and allowed the parties to present evidence. Even if the arbitrator shuttled between two rooms and spoke to the parties in an attempt to resolve contentious issues, the DRAA, as interpreted by our Supreme Court in *Miller*, is not offended. The arbitrator's opinion states that both parties presented arbitration briefs and appeared before him on October 23, 2002, "to provide testimony and evidence regarding all the factors to be considered." The arbitrator's opinion further states that the parties were permitted to submit closing arguments and supplemental evidence to him. Plaintiff admits that he introduced evidence, including tax returns, bank records, and insurance records, to support his position that no spousal support should be awarded. The record also indicates that plaintiff submitted a closing statement to the arbitrator. Furthermore, the record is devoid of any objections by plaintiff to the manner in which the hearing was conducted and devoid of any requests by plaintiff for additional hearings until after the award was rendered. Accordingly, we conclude that plaintiff's assertion, that he was not afforded a proper hearing, is unsupported by the record, and therefore, reversal is unwarranted.[2]

Next, plaintiff asserts that the arbitrator should have allowed the testimony of his subpoenaed witness who had been a caregiver for defendant's disabled son. We conclude that plaintiff presented no evidence that the arbitrator refused to allow the witness to testify at the arbitration hearing, or that plaintiff even attempted to present the witness at the hearing. We note that the subpoena that plaintiff presents lists a different hearing date than the date of the actual hearing. Moreover, plaintiff cites his letter to the arbitrator in which he requested that the arbitrator contact the witness but keep her identity confidential. This letter does not request an additional hearing at which the witness would be subject to direct examination and cross-examination. Rather, it suggests that plaintiff was attempting to have the witness give a statement without defendant's knowledge or presence. Given that a hearing was held in which plaintiff participated, and given the circumstances surrounding plaintiff's argument, we hold that there is insufficient evidence to support plaintiff's assertion that the trial court refused to hear material evidence. Furthermore, the basic substance of the proposed testimony regarding defendant's actions as caregiver to her son was relatively immaterial. The arbitrator acknowledged that defendant had been working as a caregiver for her son, but found that the

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[2] We note that the arbitration agreement, while indicating that the parties could examine witnesses if desired, also provided that the format of the hearing would be decided by the arbitrator, with the objective of expediting the hearing, that the hearing would be informal, and that "[t]he parties and their attorneys chose to be in separate rooms and prefer that the arbitrator shall hear each side individually." On the record before us, there was compliance with the agreement.

insurance proceeds were not to be attributed to defendant because, as defendant's health worsened, she would be required to pay other professionals to provide the care that she had once provided. We conclude that the trial court did not err in refusing to vacate the arbitration award.

Plaintiff next argues that the arbitrator exceeded his authority when he failed to issue the award within 60 days of the hearing as stated in the arbitration agreement. We note that arbitrators exceed their authority when they "'act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.'" *Saveski, supra* at 554-555, quoting *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). Such is the case because arbitrators derive their powers from the arbitration agreement and must act in compliance with its terms. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176-177; 550 NW2d 608 (1996).

The parties' arbitration agreement contained the following language regarding the award:

> Upon completion of the final hearing, the Arbitrator will issue an award in writing and deliver a copy to each attorney barring any unforeseen circumstances; the award will be issued within 60 days after the conclusion of the hearing.

On October 23, 2002, the arbitrator held a hearing in this matter.[3] On October 24, 2002, the arbitrator sent the parties a letter allowing them 14 days in which to submit supplementary documentation and written closing statements. The letter also provided:

> I will send another letter to each of you when the documentary evidence and <u>both</u> of your closing summaries are received at which time the 60 days in which I am permitted to issue my arbitration award will begin to run. [Emphasis in original.]

On November 6, 2002, the arbitrator granted defendant a 14-day extension. On November 7, 2002, plaintiff submitted his closing statement; however, defendant did not submit her closing statement until April 7, 2003. Several months later, on February 16, 2004, the arbitrator issued an opinion and award in this matter.

We conclude that the timeframe in the parties' agreement was not a material term of the contract. The agreement does not contain a provision asserting that time is of the essence, and there is nothing in the nature of the agreement or the circumstances under which it was entered to indicate that the parties agreed that time was of the essence. See *In re Day Estate*, 70 Mich App 242, 246; 245 NW2d 582 (1976)(holding that, in general, time should not be considered as of the essence of a contract unless expressly stated or implied by the nature of the contract or the circumstances surrounding its execution). Furthermore, the record indicates that plaintiff's conduct created, at least in part, the "unforeseen circumstances" that caused the delay. There

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[3] Defendant contends that the final arbitration hearing was held on August 1, 2003, not October 23, 2002. Plaintiff denies such a hearing. Regardless, the arbitration award was issued more than 60 days after either hearing date.

was evidence that plaintiff allowed defendant's medical insurance to lapse for nonpayment, which required the arbitrator to address this additional controversy between the parties before rendering the award. Therefore, we conclude that, because the time frame was not a material term of the contract, and because plaintiff was, at least, partially responsible for the delay, the arbitrator did not act outside of his powers in this regard.

Next, plaintiff asserts that the arbitration award should be vacated because the arbitrator exceeded his powers by ignoring controlling principles of law when he determined that the insurance money was not income to defendant despite evidence to the contrary. This issue was touched upon in our discussion of plaintiff's claim of arbitrator bias and misconduct. We initially note that, despite its framing by plaintiff, this argument could be classified as one claiming factual error, which is beyond the scope of appellate review. *Konal*, *supra* at 75. We conclude that there was evidence to support the arbitrator's decision that the insurance proceeds were for the care of defendant's disabled son and would be needed to pay other caregivers, and that the arbitrator did not ignore any controlling principles of law in declining to treat the proceeds as defendant's income for purposes of setting spousal support. We reject plaintiff's assertion that the arbitrator exceeded his powers on this basis. Because there is a lack of evidence that the arbitrator exceeded his powers, we hold that the trial court did not err in refusing to vacate the arbitration award.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly